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DEPARTMENT OF HOMELAND SECURITY

5 CFR Chapter XXXVI

Docket No. DHS-2008-0168

RINs 1601-AA17, 3209-AA15

Supplemental Standards of Ethical Conduct for Employees of the Department of Homeland Security

AGENCY: Office of the Secretary, Department of Homeland Security.

ACTION: Final rule.

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**SUMMARY:** The Department of Homeland Security (DHS), with the concurrence of the U.S. Office of Government Ethics (OGE), is finalizing this rule to supplement the OGE Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards) for DHS employees. These regulations supplement the OGE Standards and, among other things, set forth employee restrictions on the purchase of certain Government-owned property; require employees to report allegations of waste, fraud, and abuse; require employees to seek prior approval for certain outside employment and activities; prohibit employees in some DHS components from engaging in certain types of outside employment activities; and require designated components to develop instructions regarding the procedures for obtaining prior approval for outside employment and activities. These regulations also designate components within DHS as separate agencies for purposes of determining whether the donor of a gift is a “prohibited source” and of identifying an employee’s agency for the regulations governing teaching, speaking, and writing. This

rulemaking is necessary in view of DHS programs and operations; DHS is comprised of numerous legacy agencies which have varying or no supplemental ethics regulations. This final rule follows publication of a proposed rule on October 12, 2011. We considered public comments on the proposed rule while revising this final rule. This final rule includes revisions to the definition of “outside employment” and the additional provisions applicable only to employees of the U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement.

DATES: This rule is effective [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket DHS-2008-0168 and are available for inspection or copying from the Internet by going to <http://www.regulations.gov>, inserting DHS-2008-0168 in the “SEARCH” box, and then clicking “SEARCH.”

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CBP	U.S. Customs and Border Protection
CDEO	Chief Deputy Ethics Official
CFR	Code of Federal Regulations
DAEO	Designated Agency Ethics Official
DHS	Department of Homeland Security
FEMA	Federal Emergency Management Agency
ICE	U.S. Immigration and Customs Enforcement
NPRM	Notice of Proposed Rulemaking
OGE	U.S. Office of Government Ethics
U.S.C.	United States Code
§	Section Symbol

## I. Background

On August 7, 1992, the U.S. Office of Government Ethics (OGE) issued a final rule setting forth the uniform Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards), which, as corrected and amended, are codified at 5 CFR part 2635 (57 FR 35006). Effective on February 3, 1993, the OGE Standards established uniform ethics rules

applicable to all Executive branch personnel.

Pursuant to 5 CFR 2635.105, Executive branch agencies are authorized to publish, with the concurrence of OGE, supplemental regulations deemed necessary to implement their respective ethics programs. Prior to the creation of DHS, several legacy agencies were operating under supplemental ethics regulations issued by their former parent departments. The regulations finalized in this action will advance the purposes of the OGE Standards. Some outside employment interests and activities, if held by employees of certain Department of Homeland Security (DHS) components, could cause a reasonable person to question an employee's impartiality and objectivity. Particularly in view of the breadth of DHS's programs and operations, and because DHS is comprised of numerous legacy components with varying or no supplemental ethics regulations, this action is both necessary and appropriate. This rule will require prior approval of certain outside employment and activities to avoid potential conflicts of interest. This rule will also prohibit conflicting outside employment activities in certain components.

## II. Regulatory History

On October 12, 2011, DHS, with OGE's concurrence, published for comment a notice of proposed rulemaking (NPRM) to supplement the OGE Standards for DHS employees. 76 FR 63206. The NPRM proposed supplemental ethics rules designed to implement uniform ethical requirements for all DHS employees, many of whom were previously employed by 22 other Executive branch departments and agencies prior to DHS's formation in 2003. The NPRM also proposed certain ethical requirements specific to certain DHS components based on the nature of their programs and operations. Specifically, the NPRM proposed to (1) set forth employee

restrictions on the purchase of certain Government-owned property; (2) require employees to report allegations of waste, fraud, and abuse; (3) require employees to seek prior approval for certain outside employment and activities; (4) prohibit employees in some DHS components from engaging in certain types of outside employment activities; (5) require designated components to develop instructions regarding the procedures for obtaining prior approval for outside employment and activities; and (6) designate components within DHS as a separate agency for purposes of determining whether the donor of a gift is a “prohibited source” and of identifying an employee’s agency for the regulations governing teaching, speaking, and writing. These proposals sought to strengthen the integrity of DHS programs and operations and give the public greater confidence that DHS employees are held to a high standard of ethical behavior while carrying out DHS’s missions. For a more complete discussion of the proposals in the NPRM, please refer to the preamble of that document available in the public docket for this rulemaking and in the Federal Register at 76 FR 63206.

By the close of the NPRM’s public comment period on December 12, 2011, DHS received 12 comment letters. Eight of the commenters expressed concern that the NPRM’s definition of “outside employment” was overly broad. Some commenters stated that the definition impeded the constitutional rights and lawful political activities of DHS employees. Other commenters addressed the necessity for the rule, specifically the requirement to seek prior approval for outside activities and employment; the requirement for employees to report waste, fraud, abuse, and corruption; and the amount of government resources and time required to implement the rule’s provisions. Other commenters generally sought clarification on the impact the rule will have on employees serving as U.S. Coast Guard reservists and reservists in other

military services, as well as the rule's effect on official employee interactions with non-Federal entities. There were also comments on the agency-specific proposed regulations for employees of U.S. Customs & Border Protection (CBP) and U.S. Immigration & Customs Enforcement (ICE) components, regarding the broad nature of the prohibited outside employment and activities for these employees and how this might affect an employee's ability to engage in certain routine consumer transactions. In the next section, we discuss the public comments in greater detail and provide DHS responses.

### III. Discussion of NPRM Comments

#### A. Comments Regarding the Proposed Definition of "Outside Employment"

Comment: One commenter stated that the definition of "outside employment" should only include employment and activities that directly relate to an employee's official duties, because outside positions that are unrelated to the employee's duties will not present a conflict of interest. The commenter stated that any activity with a non-profit organization should be excluded from the definition, even if the activity is compensated.

DHS Response: DHS disagrees. DHS notes that matters that are "related to" the DHS mission or even the employee's official duties are not always obvious or intuitive. For example, employees may not necessarily be aware of broader DHS mission involvement, grant programs, regulatory activities, and the like, which may apply to non-profit organizations. Moreover, there are occasions when holding a fiduciary or compensated position with a non-profit organization, or providing personal services to such an organization, may indeed create a criminal conflict of interest for an employee. This is true even if the non-profit organization's mission does not relate to the employee's duties or the programs of the employee's agency.

For example, all Federal employees are prohibited by criminal statute from acting as an agent or attorney on behalf of another in a matter in which the United States is a party or has a direct and substantial interest before any officer, employee, or court of the United States. See 18 U.S.C. 205(a)(2). This rule applies regardless of whether the representation relates to the federal employee's assigned duties. Accordingly, under one possible scenario, a DHS employee who submits a grant application to another government agency in the employee's capacity as a board member of a non-profit organization would violate a criminal law by signing and submitting the application. Additionally, an employee who accepts compensation for such an activity would also violate another criminal statute, 18 U.S.C. 203, which prohibits employees from accepting compensation for certain representational activities before a Federal agency or court. These prohibitions also apply to employees holding positions with for-profit companies. The above scenario provides an illustration of the rationale behind requiring DHS employees to generally obtain prior approval to engage in outside employment and activities, and why we are not limiting the prohibition on outside employment to activities directly related to an employee's official duties or exempting all positions with non-profit organizations. These provisions not only help manage DHS's ethics program, they also protect employees from inadvertent violations of the law. Outside employment and activities – even those that appear to be unrelated to DHS's mission or the employee's duties – may create conflicts of interest or present other ethical considerations.

Comment: Two commenters raised constitutional concerns that the definition of “outside employment,” to the extent that it may include a prior approval requirement for speaking and writing on matters of public concern, acted as a prior restraint on free speech. One commenter

expressed concern that the prior approval requirement for speaking, teaching, writing, and political activity would by its nature delay the employee's ability to engage in such activities, and that all DHS employees would need to obtain prior approval for almost any expressive activity undertaken for compensation, including articles or speeches on matters of public concern unrelated to DHS's mission of the employees' duties. Another commenter expressed concern that writing personal letters to a newspaper editor or engaging in social media activities and blogging would be deemed to be an activity "under an arrangement with another person," which would fall under the prior approval requirement.

DHS Response: The definition proposed in the NPRM was not intended to unconstitutionally restrict speech or expression. DHS does not view personal, uncompensated expressions of opinion, such as writing letters to newspaper editors or social media or blogging activities, as being done under an "arrangement with another person" for purposes of the supplemental DHS ethics regulations. DHS did not intend to require prior approval to engage in these types of uncompensated, personal expressions. Additionally, DHS did not intend these regulations to adversely impact an employee's ability to engage in or abstain from political activities permitted by the Hatch Act, 5 U.S.C. 7321-7326, that Act's related regulations, or relevant Executive branch policy. Such expressions are generally not the types of activities that would create a conflicting financial interest. These expressive activities are also not likely to involve a relationship for an employee that, under the OGE Standards, would result in an employee's disqualification from participating in an official capacity or cause a reasonable person to question an employee's impartiality, or otherwise amount to a conflicting outside employment or activity. To address the concerns raised by these commenters, this final rule



narrows the definition of “outside employment” from what we proposed in the NPRM. Specifically, this final rule exempts “speaking and writing” from the definition of “outside employment,” provided that these activities are not combined with the provision of additional services that otherwise fall within the definition. The revised language also refers employees to the existing regulations at 5 CFR 2635.807 for further guidance on the limitations for accepting compensation for speaking and writing activities done in a personal capacity. The final rule retains “teaching” in the definition of “outside employment,” even though most teaching fits within the exceptions outlined in the OGE Standards.

Comment: Two commenters raised concerns that the proposed definition of “outside employment” seemed to include uncompensated speaking. The commenters also suggested that DHS should differentiate between an employee speaking or writing as a representative of the agency as opposed to speaking or writing on the employee’s own behalf for compensation. The commenters further suggested that the two exclusions should appear in the regulatory text within the relevant section under separate numbers or other designation.

DHS Response: DHS agrees that in general, personal expressions such as writing letters to the editor and other uncompensated speaking and writing activities, should not be covered as “outside employment or activity.” As explained above, this final rule revises the definition of “outside employment” from that in the NPRM to generally exempt “speaking and writing” unless it otherwise falls under the definition. The revised language also refers employees to the existing regulations in 5 CFR 2635.807 for further guidance on the limitations for accepting compensation for teaching, speaking and writing activities done in a personal capacity.

Comment: Some commenters raised concerns that the proposed definition of “outside employment” would impact an employee’s ability to interact with, prepare materials for, and/or speak to non-Federal entities and other organizations in an employee’s official capacity.

DHS Response: DHS disagrees. The regulation states that it applies to outside employment and activities, which does not include an employee’s activities in an official DHS capacity. DHS acknowledges that these comments might have been precipitated due to confusion created by an errant reference in the proposed rule to 5 CFR 2635.802 (“relates to an employee’s official duties”). This final rule contains a corrected reference that appropriately cites to 5 CFR 2635.807.

Comment: One commenter stated that the prior approval requirement violates employees’ privacy, and suggested that the definition of “outside employment” should contain a list that specifically excludes certain types of outside employment and activities that would never be a conflict for an employee (e.g., a holiday job at a retail store). The commenter also suggested that DHS should not require prior approval for certain types of employment and other activities. Finally, the commenter suggested that DHS should identify, in advance, types of employment and other activities that are always prohibited.

DHS Response: DHS declines to carve out from the “outside employment” definition and the prior approval requirement additional categories of outside employment and activities because the employment or activity would never pose an ethical conflict for any DHS employee. It is not always obvious or intuitive that a certain type of outside employment activity presents an ethical conflict. To adopt the commenter’s scenario, working at a retail establishment may indeed pose a conflict for a DHS employee. For example, ethics rules would prohibit outside

employment at certain retail stores for ICE employees who inspect retail facilities for immigration violations, or other DHS employees with official responsibilities for immigration and employment verification policies applicable to the retail industry. Although DHS does not find sufficient justification to support a broad exclusion for retail employment as the commenter suggested, the rule does provide DHS components with the discretion to exempt this type of activity under their implementing policies based on each component's unique mission. As a result, some types of outside employment or activities may be excluded by an individual component's implementing instructions.

Regarding the commenter's other suggestion, although some DHS components (specifically, CBP, FEMA, and ICE) have determined that certain types of outside employment and other activities should be prohibited, those determinations do not apply DHS-wide. For example, there is no basis for broadly extending the prohibition on CBP employees from working for a customs broker to the employees of other DHS components whose missions do not involve customs. Moreover, it is not possible to anticipate all types of outside employment and other activities that might create a potential conflict. Accordingly, this final rule does not adopt the commenter's suggestion for a blanket list of prohibited employment or activities, because such a list would likely result in overly-broad restrictions for all DHS employees.

#### B. Comments Regarding the Proposed Prior Approval Requirement

Comment: One commenter stated that the prior approval requirement was unnecessary, stating that DHS employees are "fully capable of determining for themselves whether an activity would conflict with their official responsibilities or otherwise adversely affect DHS, or create the

appearance of impropriety.” The commenter also stated that employees would voluntarily seek ethics advice without a prior approval requirement, thus rendering the requirement moot.

DHS Response: DHS disagrees. Requiring an ethics review is a low-cost mechanism for avoiding serious consequences that may accrue to employees who would otherwise inadvertently run afoul of the rules. Employees are often not aware of all applicable ethics statutes, regulations, and OGE guidance that may be implicated when engaging in outside employment or activities. The OGE Standards establish that agencies carry out an ethics program competent to ensure the fundamental objectives of providing employees with informed and objective guidance. DHS ethics counselors serve as a resource for employees and provide employees with guidance and legal opinions in order to ensure that employees are aware of and follow the relevant ethics regulations and conflict of interest statutes. Many of the ethics rules, including ones that may be implicated by outside employment and activities, include criminal penalties. Violations of these laws may carry civil and criminal penalties and may result in termination of employment. In addition, an employee who seeks an opinion from an agency ethics official and has made full disclosure of all relevant circumstances, and relies in good faith on such an opinion is shielded, at a minimum, from agency administrative action. See 5 CFR 2635.107(b).

Although many employees voluntarily seek the guidance of an agency ethics official before engaging in outside employment or activities, some conflicts may not be obvious to employees, thereby putting them at unnecessary risk for potential conflicts or violations of the law. Therefore, a regulatory requirement for employees to obtain prior approval for outside employment and other activities is not only in the best interest of DHS and the public, it will also help protect employees from inadvertent missteps.

Comment: One commenter stated that a prior approval requirement would be a waste of time and create unnecessary paperwork. The commenter also questioned DHS's motives for the prior approval requirement.

DHS Response: For the reasons stated above, the prior approval requirement will help protect DHS's interest in the integrity of its programs by creating a mechanism to affirmatively provide substantive guidance to employees in an effort to avoid potential conflicts of interest. The prior approval requirement will also help employees comply with the laws governing employee ethics. This prior approval requirement is consistent with similar requirements promulgated by other cabinet-level departments.

Additionally, DHS has determined that a uniform prior approval requirement in the DHS supplemental ethics regulations is important for establishing and maintaining consistency in the DHS ethics program. The rule will eliminate discrepancies between certain DHS employees previously employed by legacy agencies, who are covered by the legacy agency's ethics rules, and employees hired after DHS was created, who had not previously been covered by a supplemental ethics regulation. This rule will cover all DHS employees.

Comment: One commenter stated that proposed section 4601.103(a) was overbroad and exceeded the DHS and OGE's legal authority to establish the prior approval requirement. The commenter characterized the NPRM as requiring prior approval for "all types of activities."

DHS Response: DHS disagrees. The prior approval requirement applies only to certain types of outside employment and activities as defined in the rule. Additionally, section 404 of title 5 App., United States Code (U.S.C.) grants OGE the authority to promulgate regulations that govern the ethical conduct of Executive branch employees. Further, 5 CFR 2635.803 permits

agencies to require employees to obtain prior approval before engaging in certain outside employment or activities.

Comment: One commenter was concerned that the prior approval requirement would have the unintended consequence of requiring members of the military (e.g., Army and Air National Guard) to obtain prior approval to engage in military service.

DHS Response: DHS does not intend to require members of the military to seek and obtain prior approval before engaging in military service. In response to this comment and to avoid any confusion, this final rule includes a revised definition of “outside employment or activity” that specifically excludes military service.

Comment: One commenter questioned whether the rule would require U.S. Coast Guard reservists to obtain prior approval for their full-time civilian jobs.

DHS Response: DHS wishes to clarify that a U.S. Coast Guard reservist who is on voluntary active duty for a period in excess of one hundred and thirty days is considered to be a DHS employee and will be subject to the prior approval requirement for outside employment or activities. A U.S. Coast Guard reservist who is on active duty solely for training or who is involuntarily serving is considered to be a “Special Government Employee” and is not subject to the prior approval requirement; the majority of reservists fall into one of these latter categories. Accordingly, this rulemaking should have a minimal impact on the majority of U.S. Coast Guard reservists.

Additionally, this final rule requires DHS components to issue component-specific instructions or a manual that governs employee requests for approval of outside employment or

activities. The U.S. Coast Guard may address matters such as the one raised by the commenter in its instructions or manual.

Comment: One commenter argued that the prior approval requirement will strain the resources of DHS ethics offices.

DHS Response: DHS disagrees. DHS is aware that this final rule will result in employee requests for prior approval of outside employment or activities to be reviewed by ethics officials at DHS headquarters and at the components. Based on the experience of DHS ethics officials, a number of these employee requests will involve outside employment or activities that require minimal analysis, are already excluded from the regulatory definition of “outside employment,” or are (or will be) addressed in the relevant component-specific instructions or manual. For employee requests that require more detailed analysis by DHS ethics officials, DHS expects the prior approval process to help employees avoid engaging in prohibited outside employment or activities. As a result, DHS employees and ethics officials will encounter fewer actualized conflict situations, which DHS expects will offset any increased initial time investment on the part of DHS ethics officials to process employee requests for prior approval.

#### C. Comments Regarding Manuals or Instructions on Implementing the Prior Approval Requirement

Comment: One commenter noted that the proposed rule did not discuss the particulars of the publication of a “manual” and expressed concern regarding non-publication within the specified timeline.

DHS Response: DHS wishes to clarify that component manuals and instructions governing employee requests for approval of outside employment and activities will be internal

DHS documents. In response to this comment, however, this final rule clarifies that the component instructions or manuals will be issued internally within 60 days of the publication of the final rule. Instructions will be issued consistent with each component's procedures for issuing internal instructions or manuals affecting its employees. Further, the regulation as finalized also states that, "in the absence of a manual or instruction identifying a person designated to act upon a request for approval for outside employment, the Chief Deputy Ethics Official at each agency shall act upon a request." The proposed rule already provided instruction on how outside employment requests are to be processed before a specific DHS component has issued its internal instruction or manual.

Comment: One commenter was concerned that subsequent internal agency instructions may require employees to seek prior approval for all types of outside employment, even when the definition in the rule generally excludes charitable agencies.

DHS Response: DHS notes that the text of 5 CFR 4601.103(c)(2) states that, "agencies may include in their instructions or manual examples of outside employment or activities that are permissible or prohibited consistent with 5 CFR part 2635 and this part" (emphasis added). Accordingly, a DHS component's instructions may not require prior approval for any activities and employment that do not already fall under the regulatory definition of "outside employment" and the exclusions in 5 CFR 4601.102(d). For example, because the definition in the rule excludes activities or personal services with non-profit organizations that are non-fiduciary and uncompensated, a DHS component's instructions may not include this type of activity as one requiring prior approval in an agency instruction; to do so would require employees to seek prior approval for employment and activities that are inconsistent with regulatory definition of



“outside employment.” Moreover, to help ensure consistency with the applicable regulations, the DHS Designated Agency Ethics Official (DAEO) must review and approve the relevant component manuals and instructions prior to issuance.

D. Comments Regarding the Standard of Review of Outside Employment and Activity Requests

Comment: One commenter suggested that DHS adopt the standard that it will approve requests for outside employment unless there is a showing that the activity will involve prohibited conduct.

DHS Response: DHS agrees. This final rule changes the standard in the proposed rule, which had provided that DHS would approve outside employment requests only upon a determination that the activity does not involve prohibited conduct. The final standard requires DHS to grant permission to engage in the activity unless the conduct is prohibited by law or regulation, including 5 CFR part 2635 and this part. Considering the rights of employees to engage in activities and employment on their own time within the confines of the law, this revised standard still requires the reviewing official(s) to make an affirmative determination that the proposed activity or employment does or does not create a conflict of interest with the employee’s job or otherwise violate the law or ethical standards, so the integrity of the Department’s programs will still be protected but the standard will not unduly restrict an employee’s ability to participate in outside employment and other activities. This standard more accurately reflects the basis under the OGE Standards for determining whether an outside activity conflicts with an employee’s official duties. See generally 5 CFR part 2635, Subpart H.

Comment: One commenter suggested that there should be deadlines for DHS to act on

outside employment requests.

DHS Response: DHS disagrees. While DHS ethics officials consider the time sensitivities related to any request for ethics advice, these officials must sufficiently develop the facts surrounding each request in order to provide accurate ethics guidance. Setting uniform deadlines as the commenter suggests could hinder the provision of accurate ethics guidance. DHS also disagrees that a request not answered within a specific time frame should be presumed approved. This practice would not best serve the interests of DHS or its employees because potential ethics violations could subject an employee to criminal prosecution or administrative action and may disrupt ongoing operations. An employee who acts in good faith in reliance on an opinion from an agency ethics official, and has made full disclosure of all relevant circumstances, is protected from administrative action, and this reliance may also be a mitigating factor in instances of potential civil or criminal violations. An employee who acts without an opinion from an ethics official in violation of the law is not afforded such protection. 5 CFR 2635.107(b). Accordingly, a standard that would permit an employee to act in the absence of guidance from an ethics official would undermine the purpose of the ethics program and the role of the agency's ethics officials to provide guidance to employees that prevents violations of the ethics laws and regulations.

Comment: One commenter suggested that the rule should contain criteria for approval of outside employment and activities.

DHS Response: DHS notes that the ethics regulations in 5 CFR 2635.802 already contain criteria for approval of outside employment or any other outside activity (and outline the circumstances in which an employee's outside employment or activity conflicts with the

employee's official duties).

E. Comments Regarding Outside Employment Restrictions Specific to CBP

Comment: One commenter argued that the proposed rule's provisions specific to CBP would unnecessarily restrict CBP employees from engaging in outside employment or activities. Specifically, the commenter suggested that DHS clarify whether a CBP employee is prohibited from any employment by a company that engages in the listed activities, or only to the extent that the outside employment would relate to the prohibited activity. For example, the commenter inquired whether a CBP employee would be prohibited from outside employment at a law firm that conducts some customs business even if the outside employment activity is unrelated to the law firm's customs business.

DHS Response: DHS disagrees with the commenter's suggestion that the proposed rule would unnecessarily restrict CBP employees from engaging in outside employment or activities. There are certain types of employment and activities that conflict with the official duties of CBP employees and, therefore, CBP employees are prohibited from such outside employment and activities in any circumstance. Accordingly, 5 CFR 4601.104(a)(2) prohibits CBP employees from engaging in employment or business activities related to importing or exporting merchandise or agricultural products, or the entry or departure of persons into or out of the United States.

In addition, there are certain types of employers with which the employment of a CBP employee would create a conflict, regardless of the nature of the employment activity. Thus, 5 CFR 4601.104(a)(1) prohibits a CBP employee from engaging in outside employment activities in support of or on behalf of certain types of entities that generally engage in business related to

CBP missions (e.g., customs, immigration, agriculture), even if the CBP employee's actual outside employment activity at that entity would be apparently unrelated to any CBP mission. The rationale behind this latter prohibition is that employment in any capacity with such an entity would expose a CBP employee to an environment in which customs, immigration, and/or agriculture issues are discussed, and also where the employee may be queried or called upon for assistance because of the employee's affiliation with CBP. The potential risk in this environment of intermingling private and Federal interests constitutes a sufficient reason to restrict such employment in any capacity with these entities engaging in operations regulated by CBP. Finally, we note that the Department of the Treasury supplemental ethics regulation included substantially the same restriction for former Customs Service employees prior to CBP's reorganization under DHS.

Following review of the proposed regulatory text, DHS has included a number of revisions in this final rule. DHS intends the revisions to improve clarity without sacrificing important controls over potentially problematic employee activities.

Comment: One commenter argued that the proposed restriction on CBP employees to privately engage in employment or activities related to the importation or exportation of merchandise is overly broad. Specifically, the commenter argued that the provision would prohibit CBP employees from: (1) purchasing products online that would be shipped from outside the United States; (2) buying products while on vacation that would be shipped back to the United States; or (3) sending a non-monetary gift to a friend, relative, or charity outside the United States.

DHS Response: DHS does not intend this provision to cover the types of personal

transactions highlighted by the commenter. DHS intends the provision to cover outside employment in the nature of conducting transactions for a business purpose, not the personal use of an employee. In response to this comment, DHS has revised the regulatory language in this final rule so that it now includes the word “business” to clarify that the restriction does not apply to personal transactions similar to those highlighted by the commenter.

Additionally, in response to this comment, DHS conducted a broader review of the CBP provisions in the regulatory text to determine whether similar clarifications would be appropriate. As a result of that review, this final rule includes another revision to the provision that prohibits CBP employees from engaging in outside employment activities related to agriculture matters. As proposed, the rule would have generally restricted CBP employees from engaging in outside employment or activities with a business or other entity that engages in services related to “agriculture matters.” Regarding this regulatory provision, DHS only intends to restrict CBP employees from engaging with businesses or entities that deal with agricultural matters that relate to CBP’s mission. To avoid restricting CBP employee involvement in such activities that would not conflict with their official duties or CBP’s mission, this final rule includes clarifying language to that effect in the regulatory text.

F. Comments Regarding Outside Employment Restrictions Specific to ICE

Comment: One commenter argued that the proposed restriction on ICE employees to privately engage in employment or activities related to the importation or exportation of merchandise is overly broad. Specifically, the commenter expressed concern that the rule as proposed would prohibit ICE employees from mailing: (1) gifts to a relative overseas (or receiving gifts from overseas) since the package would require inspection; and (2) merchandise

to a buyer overseas after a lawful online auction.

DHS Response: Assuming that the commenter’s examples are unrelated to the operation of a business by an employee, DHS does not intend the provision to cover the types of personal transactions highlighted by the commenter. DHS intends the rule to cover outside employment in the nature of conducting business activities—this does not include personal, routine consumer transactions unrelated to the operation of a business. In response to this comment, DHS has revised the regulatory language in this final rule so that it now includes the word “business,” to clarify the scope of the restriction.

Additionally, in response to this comment and the CBP-specific comment referenced above, DHS also reviewed the ICE-specific provisions in the regulatory text to determine whether additional clarifications would be appropriate. As a result of that review, this final rule includes revisions in parallel with the CBP-specific revisions described above.

G. Comments Regarding the Requirement to Report Waste, Fraud, Abuse, and Corruption

Comment: One commenter suggested that DHS employees should be required to report not just suspected violations of laws or regulations regarding waste, fraud, abuse, and corruption, but also lawful activities as well that may constitute suspected waste, fraud, abuse, or corruption.

DHS Response: The proposed rule required employees to “report immediately any suspicions of violations of law or regulation involving Department of Homeland Security programs or operations to appropriate authorities, such as the Office of the Inspector General.” DHS has revised the final rule to mirror the language in Executive Order 12674 of April 12, 1989 (as modified by Executive Order 12731) and the general principle at 5 CFR

2635.101(b)(11). The final rule requires employees to “disclose waste, fraud, abuse, and corruption to appropriate authorities, such as the DHS Office of Inspector General.” DHS emphasizes the responsibility of DHS employees to be stewards of Government funds and to protect the integrity of DHS programs and operations.

Comment: Two commenters suggested that DHS provide greater specificity in the regulations regarding the appropriate authorities to whom employees should report suspected violations.

DHS Response: The NPRM proposed to require employees to report suspected violations to “appropriate authorities, such as the Office of the Inspector General.” DHS believes this language provides both sufficient specificity and flexibility to cover the large number of reporting chains of authority throughout DHS. Certain DHS components also maintain internal offices of internal affairs, inspections, audits, or professional responsibility, which would also be appropriate authorities for these purposes.

Comment: One commenter stated that the proposed rule would require employees to have sufficient in-depth knowledge of laws or regulations to render legal determinations on whether violations have occurred. The same commenter suggested that a requirement to report “suspicions” creates the potential for abuse and erroneous reporting, and therefore, DHS should consider requiring employees to report information that gives rise to “probable cause,” a standard used by law enforcement in certain contexts.

DHS Response: DHS disagrees with both comments. Employees are capable of detecting waste, fraud, abuse, or corruption based on common sense and personal observation.

Reporting such suspicions imposes no requirement on an employee to interpret the law or regulations, investigate, or make any determinations on the legal or other substantive merits of a potential allegation. Under the final rule, employees are responsible for alerting the appropriate authorities of a suspected violation. Trained investigators within DHS are able to conduct investigations to determine the merits of employee reports.

Comment: One commenter suggested that there should be a list of the types of alleged fraud, waste, abuse, and corruption that should be reported. Another commenter requested more specific definitions of the terms “waste,” “fraud,” “abuse,” and “corruption,” and questioned whether the requirement to report suspicions of waste applied to de minimis forms of waste (e.g., wasting small amounts of office supplies).

DHS Response: Due to the breadth and scope of incidents of possible waste, fraud, abuse, and corruption, it would be impractical to provide a comprehensive list, and it would also serve to limit the incidents to those on the list when other actions may go unreported but still qualify as a violation. As stated above, DHS expects employees to use common sense when considering whether they have observed reportable waste, fraud, abuse, or corruption. Additionally, DHS has issued guidelines to assist employees regarding how, when, and where to report such allegations. An employee who is unsure about whether there is a reporting requirement may consult an agency ethics official or the Department’s Office of Inspector General.

Comment: One commenter suggested that the rule should also require an employee to report a new arrest or charge.

DHS Response: This rule deals primarily with outside employment and waste, fraud,



abuse, and corruption. Matters such as employee arrest records are personnel matters (i.e., under the Office of Security of the Chief Human Capital Officer) and are outside the scope of this rulemaking.

#### H. Other Comments

Comment: One commenter suggested that DHS take measures to ensure that there are ethical boundaries on corporations and their level of influence over national policies.

DHS Response: This rule deals primarily with outside employment and waste, fraud, abuse, and corruption. Matters that deal with the ethical boundaries on private corporations and their level of influence over national policies are outside the scope of this rulemaking.

Comment: One commenter suggested that Executive Order 12866 requires DHS to conduct a cost-benefit analysis reviewed by OMB for this rulemaking.

DHS Response: While the NPRM was not identified as a significant regulatory action as defined by section 3(f) of Executive Order 12866, DHS did consider the costs and benefits of this rulemaking. This rule only regulates DHS employees and imposes no direct costs on the private sector. Accordingly, the NPRM certified the proposed rule would not have a significant economic impact on a substantial number of small entities (76 FR 63207).

In addition, DHS does not believe this rulemaking would increase government costs. To the extent that additional prior approval of outside employment activities increases the number of reviews by DHS ethics officials of proposed outside employment, this increased volume is expected to be offset with fewer conflict situations for ethics officials and employees. In summary, this rule only regulates DHS employees, is not expected to increase government costs, and is expected to reduce the number of conflict situations—and therefore, reduce the costs

associated with potentially lengthy investigations and corrective actions—within DHS. The rule is also expected to result in substantial additional benefits, including enhanced transparency into prior approval requirements and stronger public confidence in the integrity of DHS programs and operations.

#### IV. Discussion of Final Rule

Aside from the changes made in response to comments discussed in Section III., this final rule adopts the proposals from the NPRM. The following discussion provides a summary of the provisions in the final rule.

##### A. 5 CFR 4601.101 General

This section identifies to whom the supplemental regulations apply. It also cross-references to other ethics regulations and guidance applicable to DHS employees—including regulations on financial disclosure, financial interests, and employee responsibilities and conduct—and implementing DHS guidance and procedures issued in accordance with the OGE Standards.

This section further defines the term “agency designee” as it appears in 5 CFR 2635.102(b), to identify those persons within DHS who are designated to act on requests and make determinations relating to 5 CFR part 2635 and this part. The section also defines the term “outside employment” and lists the types of employment and activities that would require prior approval. It also lists activities for which prior approval is not required, such as the uncompensated activities (other than the reimbursement of expenses) on behalf of a charitable or nonprofit organization that do not involve fiduciary duties and do not relate to the employee’s official duties as defined by 5 CFR 2635.807. In addition, this section defines the term “Chief

Deputy Ethics Official” as the person (or persons) within DHS delegated authority by the DHS Designated Agency Ethics Official (DAEO) to manage and coordinate the ethics programs within DHS’s components and offices.

B. 5 CFR 4601.102 Designation of DHS components as separate agencies

This section identifies certain components within DHS as separate agencies for the purposes of the provisions governing prior approval for outside activities, accepting gifts from non-Federal sources, outside teaching, speaking, and writing activities, and issuing prior approval instructions. For those specified purposes, DHS has designated eight DHS components as separate agencies and has designated the remainder of the DHS components as a single agency. For the limited purpose of issuing prior approval instructions, DHS has designated the Office of Inspector General as a separate agency. To avoid confusion when reading this preamble together with the regulatory text, the discussion in this Section IV. will refer to the DHS components as “agencies,” consistent with the regulatory text of this final rule.

In addition, paragraph (c) of this section explains the applicability of these requirements to detailed employees within DHS (i.e., an employee from one agency temporarily working for another agency). An employee on detail from his/her employing agency to another agency for a period in excess of 30 calendar days is subject to the supplemental regulations and instructions of the agency to which the employee is detailed rather than the employing agency. For example, if a U.S. Customs and Border Protection (CBP) employee is detailed to U.S. Immigration and Customs Enforcement (ICE) for 60 days, the CBP employee will be subject to ICE’s supplemental regulations and instructions during the period of the detail with ICE.

C. 5 CFR 4601.103 Prior approval for outside employment and activities

This section requires employees to obtain written approval prior to engaging in any outside employment and activities, as defined by the rule. The prior approval requirement is an integral part of DHS's ethics program. The prior approval requirement is necessary to ensure that an employee's participation in certain outside employment does not adversely affect operations within the employing agency or place the employee at risk of violating applicable Federal conduct statutes and regulations. In addition, prior approval is necessary to avoid the appearance that an outside employment or activity was obtained through a misuse of the employee's official position and to address a number of other potential ethics concerns.

Because DHS provides money in the form of grants and contracts, and engages in enforcement, regulatory, and security functions across a multitude of industry sectors, requiring prior approval is necessary to ensure that the public will have confidence in the integrity of DHS programs and operations. In fulfilling its mission, DHS would be hindered if members of the public did not have confidence in DHS employees' ability to act impartially while performing their official duties.

Section 4601.103(a) requires employees to obtain approval from the DHS employee's agency for certain outside employment and activities, with or without compensation, unless the employing agency issues an instruction or manual exempting such outside employment or activities. Section 4601.103(b) describes the standard the agency must follow for approval of requests for outside employment and activities. Section 4601.103(c) describes the responsibilities of DHS agencies for issuing instructions to employees on how to request prior approval of outside employment and activities.

Because Special Government Employees may serve at DHS only for a limited time during a 365-day period and for a limited purpose (such as service on a Federal Advisory Committee or service as a consultant), the nature of their service to DHS does not require that they be subject to the prior approval requirement for outside employment and activities or the additional restrictions applicable to CBP, Federal Emergency Management Agency (FEMA), or ICE employees described below.

D. 5 CFR 4601.104 Additional rules for CBP employees

This section prohibits CBP employees, except Special Government Employees, from being employed by, or from engaging in, activities in support of or on behalf of, an entity that engages in a trade or business performing specified customs, immigration, or agriculture activities or services.

This section also requires a CBP employee with a spouse, a relative who is a financial dependent or household member, or another household member or financial dependent who is employed in a position that the CBP employee is prohibited from occupying to notify his or her agency designee in writing of the above-described employment circumstances. In addition, the employee is disqualified from participating in an official capacity in any particular matter involving such person or the person's employer unless authorized to do so by the agency designee, with the advice and clearance of the CBP Chief Deputy Ethics Official.

E. 5 CFR 4601.105 Additional rules for FEMA employees

This section prohibits certain FEMA employees, except Special Government Employees, both intermittent and non-intermittent, from being employed by a FEMA contractor. It also provides the procedures for requesting a waiver of this restriction.

F. 5 CFR 4601.106 Additional rules for ICE employees

This section prohibits ICE employees, except Special Government Employees, from being employed by, or from engaging in activities in support of or on behalf of, an entity that engages in a trade or business performing specified customs, immigration, or agriculture activities or services. This section also requires an ICE employee with a spouse, a relative who is a financial dependent or household member, or another household member or financial dependent who is employed in a position that the ICE employee is prohibited from occupying to notify his or her agency designee in writing of the above-described employment circumstances. In addition, the employee is disqualified from participating in an official capacity in any particular matter involving such person or the person's employer unless authorized to do so by the agency designee, with the advice and clearance of the ICE Chief Deputy Ethics Official.

G. 5 CFR 4601.107 Prohibited purchases of property

This section prohibits the purchase by employees of certain Government property under the control of, seized by, forfeited, under the direction of, or incident to, the employee's agency. It also sets forth the exception and waiver provisions under this section.

H. 5 CFR 4601.108 Reporting waste, fraud, abuse, and corruption

This section requires all DHS employees to report allegations of waste, fraud, abuse, or corruption to the appropriate authorities within DHS, such as the DHS Office of Inspector General or the appropriate Office of Internal Affairs or Office of Professional Responsibility. Employee responsibilities for reporting suspicions of violations of law or regulation to the DHS Office of Inspector General or similar office are found in related DHS and agency instructions. This regulation complements but does not displace those responsibilities.

## V. Regulatory Analyses

### A. Executive Orders 12866 and 13563

This rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. Accordingly, the Office of Management and Budget has not reviewed it. As discussed previously, this rule only regulates DHS employees and consequently does not impose any additional direct costs on the private sector. In addition, DHS does not believe this rulemaking would increase government costs. To the extent that additional prior approval of outside employment activities increases the number of reviews by DHS ethics officials of proposed outside employment, this increased volume is expected to be offset with fewer conflict situations — and therefore, reduce the costs associated with potentially lengthy investigations and corrective actions—within DHS. The rule is also expected to result in substantial additional benefits, including enhanced transparency into prior approval requirements and stronger public confidence in the integrity of DHS programs and operations.

### B. Small Entities / Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601-612), DHS has considered whether this rule will have a significant economic impact on a substantial number of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. DHS certifies that this rule would not have a significant economic impact on a substantial number of small entities, because it would only

directly affect DHS employees.

### **List of Subjects in 5 CFR Part 4601**

Conflict of interests, Government employees.

For the reasons set forth in the preamble, DHS, with the concurrence of the U.S. Office of Government Ethics, is amending title 5 of the Code of Federal Regulations by adding chapter XXXVI, consisting of part 4601, to read as follows:

Title 5—Administrative Personnel

Chapter XXXVI—Department of Homeland Security

### **PART 4601—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT OF HOMELAND SECURITY**

Sec.

4601.101 General.

4601.102 Designation of DHS components as separate agencies.

4601.103 Prior approval for outside employment and activities.

4601.104 Additional rules for U.S. Customs and Border Protection (CBP) employees.

4601.105 Additional rules for Federal Emergency Management Agency (FEMA) employees.

4601.106 Additional rules for U.S. Immigration and Customs Enforcement (ICE) employees.

4601.107 Prohibited purchases of property.

4601.108 Reporting waste, fraud, abuse, and corruption.

Authority: 5 U.S.C. 301, 7301, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.203(a), 2635.403(a), 2635.702, 2635.703, 2635.802(a), 2635.803, 2635.807(a)(2)(ii).

### **§ 4601.101 General.**



(a) Applicability. In accordance with 5 CFR 2635.105, the regulations in this part apply to employees of the Department of Homeland Security (DHS) and supplement the Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards) in 5 CFR part 2635.

(b) Cross-references to other ethics regulations and guidance. In addition to the OGE Standards in 5 CFR part 2635 and this part, DHS employees are subject to the Executive branch financial disclosure regulations contained in 5 CFR parts 2634, the Executive branch financial interests regulations contained in 5 CFR part 2640, the Executive branch employee responsibilities and conduct regulations contained in 5 CFR part 735, and DHS guidance and procedures on employee conduct, including those issued under paragraph (c) of this section.

(c) DHS agency instructions. Prior to issuance, the DHS Designated Agency Ethics Official (DAEO) must approve any internal instructions or manuals that DHS agencies, as designated in § 4601.102 of this part, issue to provide explanatory ethics-related guidance and to establish procedures necessary to implement 5 CFR part 2635 and this part.

(d) Definitions—(1) Agency designee as used in this part and in 5 CFR part 2635 means an employee who has been identified in an instruction or manual issued by an agency under paragraph (c) of this section to make a determination, give an approval, or take other action required or permitted by this part or 5 CFR part 2635 with respect to another employee.

(2) Outside employment or activity as used in this part means any form of non-Federal employment, business activity, business relationship, or other covered activity as identified in this section, involving the provision of personal services by the employee, whether or not for compensation. It includes, but is not limited to, personal services as an officer, director,

employee, agent, attorney, advisor, consultant, contractor, general partner, trustee, or teacher. There are several exclusions and limitations to the definition as described immediately below.

(i) Speaking and writing activities. Outside employment generally does not include speaking and writing activities so long as they are not combined with the provision of other services that do fall within this definition, such as the practice of law and other outside employment or activities covered by paragraph (d)(2)(ii)(A) through (D) of this section. Employees who wish to engage in compensated speaking or writing in a personal capacity are subject to the provisions of 5 CFR 2635.807 and are encouraged to seek additional guidance from an agency ethics official.

(ii) Nonprofit and other organizations. Outside employment does not include participation in the activities of a nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service, or civic organization, unless the participation involves:

- (A) Acting in a fiduciary capacity,
- (B) Providing professional services for compensation,
- (C) Rendering advice for compensation other than the reimbursement of expenses, or
- (D) An activity relating to the employee's official duties as defined in 5 CFR 2635.807(a)(2)(i)(A) through (E), to include activities relating to any ongoing or announced policy, program, or operation of the employee's agency as it is defined at 5 CFR 4601.102.

(iii) The Hatch Act. Outside employment does not include activities otherwise permissible by the Hatch Act and related regulations relating to partisan political activities.

(iv) Military service. Outside employment does not include state or Federal military service protected by the Uniformed Services Employment and Reemployment Rights Act.

(v) Additional restrictions for certain employees. Employees of the Federal Emergency Management Agency, U.S. Customs and Border Protection, and U.S. Immigration and Customs Enforcement should also refer to the agency-specific provisions in this part relating to outside employment.

(3) Chief Deputy Ethics Official as used in this part means the persons delegated authority by the DHS DAEO to manage and coordinate the ethics programs within the DHS components pursuant to the DAEO's authority in 5 CFR 2638.204.

(4) "Special Government Employee" as used in this part has the same meaning as in 18 U.S.C. 202(a).

**§ 4601.102 Designation of DHS components as separate agencies.**

(a) Pursuant to 5 CFR 2635.203(a), DHS designates each of the following components as a separate agency for purposes of the regulations in subpart B of 5 CFR part 2635 governing gifts from outside sources, including determining whether the donor of a gift is a prohibited source under 5 CFR 2635.203(d); for purposes of the regulations in § 4601.103(c) of this part governing the establishment of procedures for obtaining prior approval for outside employment; for purposes of the regulations in § 4601.103(c) of this part governing the designation of officials; and for the purposes of the regulations in 5 CFR 2635.807 governing teaching, speaking, and writing:

(1) Federal Emergency Management Agency (FEMA);

(2) Federal Law Enforcement Training Center;

- (3) Transportation Security Administration;
- (4) U.S. Citizenship and Immigration Services;
- (5) U.S. Coast Guard;
- (6) U.S. Customs and Border Protection (CBP);
- (7) U.S. Immigration and Customs Enforcement (ICE); and
- (8) U.S. Secret Service.

(b)(1) DHS will treat employees of DHS components not designated as separate agencies in paragraph (a) of this section, including employees of the Office of the Secretary, as employees of the remainder of DHS. For purposes of the regulations in subpart B of 5 CFR part 2635 governing gifts from outside sources, including determining whether the donor of a gift is a prohibited source under 5 CFR 2635.203(d); for purposes of the regulations in § 4601.103(c) of this part governing the establishment of procedures for obtaining prior approval for outside employment; for purposes of the regulations in § 4601.103(c) of this part governing the designation of officials; and for purposes of the regulations in 5 CFR 2635.807 governing teaching, speaking, and writing, DHS will treat the remainder of DHS as a single agency that is separate from the components designated as separate agencies in paragraph (a) of this section.

(2) For the limited purposes of establishing procedures for obtaining prior approval for outside employment and designating officials pursuant to § 4601.103(c) of this part, DHS will treat the DHS Office of Inspector General as a separate agency.

(c) An employee on detail from his or her employing agency to another agency for a period in excess of 30 calendar days is subject to the supplemental regulations and instructions of the agency to which he is detailed rather than his or her employing agency.

**§ 4601.103 Prior approval for outside employment and activities.**

(a) General requirement for approval. A DHS employee, other than a Special Government Employee, shall obtain prior written approval before engaging in any outside employment or activity (as defined by § 4601.101 of this part), with or without compensation, unless the employee's agency has exempted the outside employment or activity (or category or class of outside employment or activity) from this requirement by an instruction or manual issued pursuant to paragraph (c) of this section.

(b) Standard for approval. Approval shall be granted unless it has been determined that the outside employment is expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635 and this part.

(c) Agency responsibilities. (1) With the approval of the DHS DAEO, each agency as set forth in § 4601.102 of this part shall issue internal instructions or a manual governing the submission of requests for approval of outside employment and activities and designating appropriate officials to act on such requests not later than [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(2) The instructions or manual may exempt particular outside employment or activities (or categories or classes of outside employment or activities) from the prior approval requirement of this section if such outside employment or activities would generally be approved and are not likely to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635 and this part. Agencies may include in their instructions or manual examples of outside employment or activities that are permissible or prohibited consistent with 5 CFR part 2635 and this part.

(3) In the absence of a manual or instruction identifying a person designated to act upon a request for approval for outside employment, the Chief Deputy Ethics Official at each agency shall act upon a request.

**§ 4601.104 Additional rules for U.S. Customs and Border Protection (CBP) employees.**

The following rules apply to employees of CBP, except Special Government Employees, and are in addition to §§ 4601.101 through 4601.103 and §§ 4601.107 and 4601.108 of this part:

(a) Prohibitions on outside employment and activities. (1) No CBP employee shall be employed by or engage in activities in support of or on behalf of a customs broker; international carrier; bonded warehouse; foreign trade zone as defined in 15 CFR 400.2; cartman; law firm engaged in the practice of customs, immigration, or agriculture law; entity engaged in the enforcement of customs, immigration, or agriculture law; importation or exportation department of a business; or business or other entity which engages in services related to agriculture matters where such agriculture matters relate to CBP's mission.

(2) No CBP employee shall, in any private capacity, engage in employment or a business activity related to the importation or exportation of merchandise or agricultural products requiring inspection (other than a personal, routine consumer transaction unrelated to the operation of a business), or the entry of persons into or departure of persons from the United States.

(3) No CBP employee shall engage in outside employment or activities for a non-profit or other organization that involve assisting persons with matters related to the entry of persons or merchandise into or the departure of persons or merchandise from the United States, or matters related to obtaining temporary or permanent residency, citizenship, adjustment of status, or other

immigration-related benefits.

(b) Restrictions arising from employment of the spouse, relatives, members of the employee's household, or financial dependents. (1) A CBP employee shall notify in writing his or her agency designee when any of the following circumstances exist:

(i) The spouse of the CBP employee is employed in a position that the CBP employee would be prohibited from occupying by paragraph (a) of this section;

(ii) A relative (as defined in 5 CFR 2634.105(o)), who is financially dependent on or who is a member of the household of the CBP employee, is employed in a position that the CBP employee would be prohibited from occupying by paragraph (a) of this section; or

(iii) Any person, other than the spouse or relative of the CBP employee, who is financially dependent on or who is a member of the household of the CBP employee, is employed in a position that the CBP employee would be prohibited from occupying by paragraph (a) of this section.

(2) The CBP employee shall be disqualified from participating in an official capacity in any particular matter involving the individuals identified in paragraph (b)(1) of this section, or the employer thereof, unless the agency designee, with the advice and clearance of the CBP Chief Deputy Ethics Official, authorizes the CBP employee to participate in the matter using the standard in 5 CFR 2635.502(d), or the waiver provisions in 18 U.S.C. 208(b)(1), as appropriate.

**§ 4601.105 Additional rules for Federal Emergency Management Agency (FEMA) Employees.**

The following rules apply to employees of FEMA, except Special Government Employees, and are in addition to §§ 4601.101 through 4601.103 and 4601.107 and 4601.108 of this part:

(a) Prohibited outside employment (intermittent employees). Except as provided in paragraph (c) of this section, no intermittent FEMA employees hired under the authority of 42 U.S.C. 5149, which includes all Disaster Assistance Employees or Stafford Act Employees and Cadre of On-Call Response Employees, shall be employed by a current FEMA contractor while a FEMA employee, whether or not they are on activated status.

(b) Prohibited outside employment (non-intermittent employees). Except as provided in paragraph (c) of this section, no non-intermittent FEMA employee shall be employed by a current FEMA contractor.

(c) Waivers. The FEMA Chief Deputy Ethics Official or his or her agency designee may grant a written waiver of any prohibition in paragraphs (a) and (b) of this section with the DAEO's concurrence. To grant the waiver, the FEMA Chief Deputy Ethics Official or his or her agency designee must determine that the waiver is consistent with 5 CFR part 2635 and not otherwise prohibited by law; that the prohibition is not necessary to avoid the appearance of misuse of position or loss of impartiality; and that the waiver will not undermine the public's confidence in the employee's impartiality and objectivity in administering FEMA programs. A waiver under this paragraph may impose appropriate conditions, such as requiring execution of a written disqualification statement.

**§ 4601.106 Additional rules for U.S. Immigration and Customs Enforcement (ICE) employees.**



The following rules apply to employees of ICE, except Special Government Employees, and are in addition to §§ 4601.101 through 4601.103 and 4601.107 and 4601.108 of this part:

(a) Prohibitions on outside employment and activities. (1) No ICE employee shall be employed by or engage in activities in support of or on behalf of a customs broker; international carrier; bonded warehouse; foreign trade zone as defined in 15 CFR 400.2; cartman; law firm engaged in the practice of customs, immigration or agriculture law; entity engaged in the enforcement of customs, immigration or agriculture law; importation department of a business; or business or other entity which engages in agriculture matters where such agriculture matters relate to ICE's mission.

(2) No ICE employee shall, in any private capacity, engage in employment or a business activity related to the importation or exportation of merchandise or agricultural products requiring inspection (other than a personal, routine consumer transaction unrelated to the operation of a business), or the entry of persons into or the departure of persons from the United States.

(3) No ICE employee shall engage in outside employment or activities for a non-profit or other organization that involve assisting persons with matters related to the entry of persons or merchandise into or the departure of persons or merchandise from the United States, or matters related to obtaining temporary or permanent residency, citizenship, adjustment of status, or other immigration-related benefits.

(b) Restrictions arising from employment of spouse, relatives, members of the employee's household, or financial dependents. (1) An ICE employee shall notify in writing his or her agency designee when any of the following circumstances exist:

(i) The spouse of the ICE employee is employed in a position that the ICE employee would be prohibited from occupying by paragraph (a) of this section;

(ii) A relative (as defined in 5 CFR 2634.105(o)) who is financially dependent on or who is a member of the household of the ICE employee is employed in a position that the ICE employee would be prohibited from occupying by paragraph (a) of this section; or

(iii) Any person, other than the spouse or relative of the ICE employee, who is financially dependent on or who is a member of the household of the ICE employee, is employed in a position that the ICE employee would be prohibited from occupying by paragraph (a) of this section.

(2) The ICE employee shall be disqualified from participating in an official capacity in any particular matter involving the individuals described in paragraph (b)(1) of this section or the employer thereof, unless the agency designee, with the advice and clearance of the ICE Chief Deputy Ethics Official, authorizes the ICE employee to participate in the matter using the standard in 5 CFR 2635.502(d), or the waiver provisions in 18 U.S.C. 208(b)(1), as appropriate.

**§ 4601.107 Prohibited purchases of property.**

(a) General prohibition. Except as provided in paragraph (c) of this section, no DHS employee may purchase, directly or indirectly, property that is:

(1) Owned by the Federal Government and under the control of the employee's agency, unless the sale of the property is being conducted by the General Services Administration; or

(2) Seized or forfeited under the direction or incident to the functions of the employee's agency.

(b) Designated separate components. For purposes of this section, the employee's agency is the relevant separate agency component as set forth in § 4601.102 of this part.

(c) Waiver. Employees may make a purchase prohibited by paragraph (a) of this section where a written waiver of the prohibition is issued in advance by the agency designee with the clearance of the DAEO or his or her designee. A waiver may only be granted if it is not otherwise prohibited by law or regulation and the purchase of the property will not cause a reasonable person with knowledge of the particular circumstances to question the employee's impartiality, or create the appearance that the employee has used his or her official position or nonpublic information for his or her personal gain.

**§ 4601.108 Reporting waste, fraud, abuse, and corruption.**

Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities, such as the DHS Office of Inspector General.

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Jeh Charles Johnson,  
Secretary

Approved:

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Walter M. Shaub, Jr.  
Director, U.S. Office of Government Ethics

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